TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 275.

SIDNEY A. STOCKDALE, COLLECTOR OF INTERNAL REVENUE, PLAINTIFF IN ERROR,

vs.

THE MERCHANTS' MUTUAL INSURANCE COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF LOUISIANA.

FILED NOVEMBER 27, 1872.

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1 UNITED STATES OF AMERICA:

Circuit court of the United States for the fifth judicial circuit and district of Louisiana.

MERCHANTS' MUTUAL INSURANCE COMPANY of New Orleans *versus* S. A. STOCKDALE. } No. 6521.

Petition, affidavit, and order for writ of certiorari.—Filed October 20, 1871.

To the hon. the judges of the circuit court of the United States for the fifth circuit and district of Louisiana:

The petition of S. A. Stockdale, of New Orleans, Louisiana, with respect, shows: That he is an officer of the United States, to wit, collector of internal revenue, for the first collection district of Louisiana, duly appointed and acting under authority of an act entitled "An act to provide internal revenue to support the Government,
2 to pay interest on the public debt, and for other purposes," passed 30th June, 1864, and of acts in addition thereto and amendatory thereof; that the following entitled civil suits have been commenced against him by the plaintiffs therein named, in the fourth district court for the parish of Orleans, a court of the State of Louisiana, holding sessions in the city of New Orleans, viz:

27817.	Bank of America	vs. S. A. Stockdale.
27818.	Sun Mutual Insurance Co. of N. O.	do.
27819.	Germania " " "	do.
27820.	Merchants' Mutual " "	do.
27821.	Citizens' Bank of Louisiana	do.
27822.	Union Insurance Co. of N. O.	do.
27823.	New Orleans Mutual Ins. Co.	do.
27824.	Home Mutual Ins. Co.	do.
27825.	Liquidating Commissioners of Pelican Insurance Co.	
27826.	New Orleans Canal & Banking Co.	do.

That process of citation has been served upon him within this district in each of the said several suits, but no trial of any of said suits has been had.

3 That the said suits are severally instituted against petitioner for the purpose of recovering from him the amounts of money in the petitions in said suits set forth, and which are alleged to have been illegally assessed against and collected from the said plaintiffs, respectively, for internal-revenue taxes on dividends and surplus profits by them respectively made and declared, for and during the periods therein mentioned.

Petitioner prays that writs of certiorari may be issued to the said 4th district court for the parish of Orleans, requiring said court to send to this hon. court the records and proceeding' in the several causes therein named.

(Signed) J. W. GURLEY,
Ass't U. S. Attorney.

Affidavit.

S. A. Stockdale, being sworn, says all the allegations in the foregoing petition are true.

(Signed) S. A. STOCKDALE.

Sworn to and subscribed before me this 20th day of October, 1871.
(Signed) F. B. VINOT, *D'y Clk.*

4 *Certificate of counsel.*

I certify that, as counsel for petitioner herein, I have examined the proceedings against him in the above-enumerated cases, and careful' enquired into all the matters set forth in his petition, and believe the same to be true.
(Signed) J. W. GURLEY,
Ass't U. S. Att'y.

Order.

Presented to me at my office, in the city of New Orleans, this 20th day October, 1871, and, the court not being in session, a writ of certiorari is allowed and issued as prayed for.
(Signed) F. A. WOOLFLEY, *Clerk.*

Writ of certiorari.

United States circuit court.

MERCHANT'S MUTUAL INSURANCE COMPANY of New Orleans
vs.
S. A. STOCKDALE. } No. 6521.

The President of the United States to the honorable the fourth district court of the parish of Orleans, greeting:

5 You are hereby commanded, in the name of the President of the United States of America and of the circuit court of the United States for the fifth circuit and district of Louisiana, to send to this honorable court the record and proceedings in the suit of the Merchants' Mutual Ins. Co., of New Orleans, versus S. A. Stockdale, No. 27820 of the docket of said court.

Witness the honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, at New Orleans, this 20th day of October, 1871.

[SEAL.] (Signed) F. A. WOOLFLEY,
Clerk of the U. S. Cir't Court.

Marshal's return.

Received October 21st, 1871, by the U. S. marshal, and, on the 24th of October, 1871, served a copy hereof with petition accompanying the same, on the fourth district court of the parish of Orleans, by handing them to George P. Fernald, clerk of said court, at his office in this city.
(Signed) S. W. REED,
D'y U. S. Marshal.

6 *Record from fourth dist. court.—Filed November 15th, 1871.*

MERCHANTS' MUTUAL INSURANCE COMPANY of New Orleans
vs.
SIDNEY A. STOCKDALE.

To the honorable the fourth district court for the parish of Orleans, State of Louisiana:

The petition of the Merchants' Mutual Insurance Company of New Orleans, incorporated under the laws of Louisiana, and domiciled in the

city of New Orleans, in said State, respectfully shows that Sidney A. Stockdale, residing at the same place, is indebted unto your petitioner in the sum of ($11,093.01) eleven thousand and ninety-three dollars and one cent, with interest thereon at the rate of five per cent. per annum, from the thirty-first day of August, A. D. 1870, until paid, for this, to wit:

That, on or about the third day of June, A. D. 1870, your
7 petitioner declared a dividend amounting to the sum of $215,850 *dollars* and added the further sum of $6,010.20 *dollars* to its surplus or contingent fund, which dividend was payable on and after the first day of August, 1870.

And afterwards, to wit, on or about the thirty-first day of August, 1870, said Sidney A. Stockdale, defendant, being collector of the United States internal revenue in and for the first collection district of the State of Louisiana, did, then and there, unlawfully and wrongfully, demand from your petitioner the sum of eleven thousand and ninety-three dollars and one cent, as an alleged tax, which he claimed was due to the United States by reason of an assessment by B. F. Joubert, assessor of United States internal revenue for said district, of five per cent. upon said dividend and surplus profits of your petitioner, which demand was accompanied by a threat of seizure and sale of petitioner's property for the purpose of collecting said alleged tax, with penalties, if the
8 same were not paid within the delay specified; wherefore your petitioner paid the sum aforesaid to said defendant the thirty-first day of August, 1870.

Your petitioner avers that said assessment and collection of said sum of money alleged to be a tax, was wholly without warrant or authority in law.

Your petitioner avers that it was without authority to with'old said alleged tax from said dividend, and therefore paid the same in full to the persons entitled thereto, prior to said alleged tax being demanded.

Your petitioner avers that, "according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof," it appealed to the Commissioner of Internal Revenue for, and demanded the refunding and return to it of, said sum of money, so as aforesaid wrongfully and illegally demanded and collected from your petitioner by said defendant; and said Commissioner, on the fifteenth day of April, 1871, rejected said de-
9 mand within six months prior to the commencement of this suit.

Wherefore your petitioner prays that said defendant, Sidney A. Stockdale, be cited to answer this demand, and, after due proceedings had, he be condemned to pay your petitioner the sum of eleven thousand and ninety-three dollars and one cent, with legal interest, from the thirty-first day of August, 1870, until paid, and costs of suit; and, petitioner prays for general relief.

(Signed) CASE AND ROUSE
Att'ys for Petitioner.

Citation.

State of Louisiana, fourth district court for the parish of Orleans, in the city of New Orleans.

MERCHANTS' MUTUAL INSURANCE CO. OF New Orleans
vs.
S. A. STOCKDALE. } No. 27820.

M. S. A. STOCKDALE:

You are hereby summoned to comply with the demand contained in the petition of which a copy accompanies this citation, or
10 deliver your answer to the same in the office of the clerk of the fourth district court for the parish of Orleans, in ten days after the service hereof.

Witness the honorable Paul E. Theard, judge of the said court, the 10th day of October, in the year of our Lord, 1871.

(Signed) WM H. CARSON,
Deputy Clerk.

Sheriff's return.

Received October 11th, 1871, and, on the 12th of October, 1871, served a copy of the within citation and accompanying petition on S. A. Stockdale, through N. Burbank, esq., chief deputy collector, who represent' him in person, the within Mr. Stockdale being out at the time of said service.

Ret. same day.

(Signed) A. LABAT, *D'y Sh'ff.*

Citation.

11 State of Louisiana, fourth district court for the parish of Orleans, in the city of New Orleans.

MERCHANTS' MUTUAL INSURANCE COMPANY of New Orleans
vs.
MR. S. A. STOCKDALE. } No. 2782'.

Mr. S. A. STOCKDALE,
New Orleans:

You are hereby summoned to comply with the demand contained in the petition of which a copy accompanies this citation, or deliver your answer to the same in the office of the clerk of the fourth district court for the parish of Orleans, in ten days after the service hereof.

Witness the honorable Paul E. Theard, judge of the said court, the 14 day of October, in the year of our Lord, 1871.

(Signed) T. WALL, *D'y Clk.*

Sheriff's return.

Received October 14th, 1871, and, on same day, month, and year, served a copy of the within citation and accompanying petition on S. A. Stockdale in person.

She'ff's fees, $2.00.

Ret. same day.

12 (Signed) J. H. WILBUR, *D'y Sh'ff.*

Answer.—Filed Nov'r 21st, 1871.

Circuit court of the United States for the 5th circuit and district of Louisiana.

MERCHANTS' MUTUAL INSURANCE CO.
vs.
S. A. STOCKDALE, COLL'R, &C. } No. 6521.

Now comes the defendant, S. A. Stockdale, and, for answer to plaint-

iff's petition, denies all and singular the allegations therein contained, and prays to be hence dismissed with costs.

(Signed) J. R. BECKWITH,
U. S. Att'y, for Def't.

Statement of facts.—Filed April 15th, 1872.

United States circuit court, 5th circuit and district of Louisiana.

THE MERCHANTS' MUTUAL INSURANCE COMpany of New Orleans
vs.
SIDNEY A. STOCKDALE. } No. 6521.

STATEMENT OF FACTS.

13 And afterwards, on the 15th day of April, 1872, of the November term of said court, A. D. 1871, in open court, came as well the said plaintiff, by Messrs. Case and Rouse, its attorneys, and the said defendant, by J. R. Beckwith, U. S. att'y, and, having waived a trial by jury, agreed upon and submitted to the court the following statement of facts involved in this case, that is to say:

1st. That the plaintiff is a body corporate, duly created by the laws of Louisiana, and domiciled in said State, and, since the 1st day of January, 1868, has, as such corporation, carried on the business of fire and marine insurers at the city of New Orleans.

2d. That, on the third day of June, A. D. 1870, said corporation, plaintiff, declared a scrip-dividend of the earnings which had accrued to said corporation from the 1st day of June, 1869, to and including the 31st day of May, 1870, amounting to the gross sum of two hun-
14 dred and fifteen thousand eight hundred and fifty dollars, and at the same time added to its surplus fund the sum of six thousand and ten dollars and twenty-two cents undivided earnings for the same period, which dividend was payable on and after the first day of August, 1870, and for which dividend certificates were issued in payment without any deduction for any tax.

4th. That said assessor of internal revenue assessed against said plaintiff an alleged internal-revenue tax, upon said dividend and surplus profits, at the rate of five per centum, said assessment amounting to the gross sum of eleven thousand and ninety-three dollars and one cent, and returned the same upon his monthly list of assessments for the month of July, 1870, to said defendant, collector of internal revenue as aforesaid, for collection.

5th. That defendant, collector as aforesaid, demanded payment
15 of the same, so as aforesaid assessed, from the said plaintiff, and notified the plaintiff that if the same were not paid, that he would distrain upon and sell plaintiff's property to make such tax; and thereupon said plaintiff, on the thirty-first day of August, 1870, paid to said defendant, collector as aforesaid, the sum demanded as such tax, to wit, the sum of eleven thousand and ninety-three dollars and one cent.

6th. That said plaintiff, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof, then in force, appealed to the Commissioner of Internal Revenue and demanded the refunding and return to plaintiff of said sum of eleven thousand and ninety-three dollars and one cent,

so as aforesaid paid to said defendant; that said Commissioner rejected said appeal and refused to allow said money to be refunded to plaintiff, on the fifteenth day of April, 1871, less than six months prior to the commencement of this action, which was instituted within one year from the date of said appeal.

16 7th. That said sum of money, plaintiff to defendant, collector as aforesaid, has, in the due and regular course of business in the office of said defendant, been paid into the Treasury of the United States.

And having so agreed upon said facts, as herein stated, said plaintiff and said defendant, by their said respective attorneys, did then and there respectively pray the judgment of the court in the premises.

(Signed) CASE AND ROUSE,
Att'ys for Pl'ff.

(Signed) J. R. BECKWITH,
U. S. Att'y, for Def't.

Document.—Filed 15th April, 1872.

TREASURY DEPARTMENT,
OFFICE OF INTERNAL REVENUE,
Washington, April 15th, 1872.

SIR: Your claim for the refunding of $5,571.40 *dollars* has been rejected.

This office will give the collector of your district the reasons in full for the rejection of the same.

17 Very respectfully,
(Signed) A. PLEASONTON,
Commissioner.

Pres't Merchants' Mutual Ins. Co., New Orleans, La.

Order of continuance.—Extract from the minutes.

November term, 1871.

NEW ORLEANS, *Monday April 15th*, 1872.

Court met pursuant to adjournment. Present, Hon. E. H. Durell, district judge.

MERCHANTS' MUTUAL INSURANCE COMPANY of New Orleans
vs.
S. A. STOCKDALE. } No. 6521.

The counsel in the above case having filed statement of facts, it was ordered that the matter be argued on to-morrow at 11 a. m.

Submission of cause.—Extract from minutes of 16th April, 1872.

MERCHANTS' MUTUAL INSURANCE CO. OF New Orleans
vs.
S. A. STOCKDALE. } No. 6521.

18 The above cause came up for trial before this court, the parties in writing having waived the jury; and, after hearing the argument of counsel on both sides, the court took time to advise.

Judgment.—From judgment-book.

April term, 1872.

NEW ORLEANS, *Wednesday, May 1st*, 1872.

Court met pursuant to adjournment. Present, Hon. E. H. Durell, district judge.

MERCHANTS' MUTUAL INSURANCE COMPANY of New Orleans
vs.
S. A. STOCKDALE. } 6521.

For reasons orally assigned in the written opinion of the court, this day delivered and on file in the case of the Home Mutual Ins. Co. vs. this defendant—

It is ordered, adjudged, and decreed that the plaintiff, The Merchants' Mutual Insurance Company of New Orleans, do recover from the defendant, Sidney A. Stockdale, the sum of eleven thousand ninety-three $\frac{01}{100}$ dollars, with 5 % interest from 31st August, 1870, till paid, and costs of suit.

19 And it further appearing that the defendant is collector of internal revenue for the first collection district of Louisiana, and that this action was brought against the said defendant in his official character and capacity, for money paid to him, and by him into the Treasury of the United States in the performance of his official duty as such collector of internal revenue, and that he had reasonable and probable cause for collecting from said plaintiff the said money now recovered back from him by the aforesaid judgment—

It is therefore further ordered that no execution or other writ for the enforcement of the judgment issue against the said defendant, but that the same be provided and paid out of the proper appropriation from the Treasury, as provided by law in such cases.

Judgment rendered May 1st, 1872.

Judgment signed May 6th, 1872.

(Signed) E. H. DURELL, *Judge.*

20 UNITED STATES OF AMERICA:

Circuit court of the United States, fifth circuit and district of Louisiana.

CLERK'S OFFICE.

I, Francis A. Woolfley, clerk of the circuit court of the United States for fifth circuit and district of Louisiana, do hereby certify that the foregoing 19 pages contain and form a full, complete, true, and perfect transcript of the record and proceedings had, together with all the evidence adduced on the trial of the case of The Merchants Mutual Insurance Company of New Orleans, vs. Sidney A. Stockdale, No. 6521 of the docket, so far as the same now remain of record or on file in said court.

Witness my hand and the seal of said court, at the city of New Orleans, this 18th day of November, A. D. 1872.

[SEAL.] F. A. WOOLFLEY, *Clerk.*

I, E. H. Durell, United States judge for the district of Louisiana, do hereby certify that Francis A. Woolfley, whose name is signed

to the above certificate, as clerk of the circuit court of the United States for the fifth circuit and district of Louisiana, was, at the time of signing said certificate, and is now, the clerk of said court; that said certificate is in due form of law, and that full faith and credit are due to his official attestations as such clerk.

Given under my hand at the city of New Orleans, in said district, this 18th day of November, A. D. 1872.

E. H. DURELL, *Judge.*

21 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States in and for the fifth circuit and holding sessions for the district of Louisiana, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, or one of you, between Merchants' Mutual Insurance Company of New Orleans, and Sidney A. Stockdale, collector of internal revenue for the first collection district of Louisiana, a manifest error hath happened, to the great damage of the said Sidney A. Stockdale, collector as aforesaid, defendant, as by his complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the first Monday of December next, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the honorable Salmon P. Chase, Chief Justice of the said Supreme Court of the United States, this 29 day of April, in the year of our Lord one thousand eight hundred and seventy-two.

[SEAL.] F. A. WOOLFLEY,
Clerk of the United States Circuit Court
for the District of Louisiana.

(Indorsed:) United States circuit court. No. 6521. Sidney A. Stockdale, plaintiff in error, versus Merchants' Mutual Insurance Company of New Orleans, def'd'ts in error. Writ of error. Filed May 13th, 1872. F. A. Woolfley, clerk.

22 THE UNITED STATES OF AMERICA,
District of Louisiana:

The President of the United States to Merchants' Mutual Insurance Company of New Orleans, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at the City of Washington, on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the fifth circuit and district of Louisiana, wherein Sidney A. Stockdale, collector of internal revenue for the first collection district of Louisiana, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be cor-

rected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this 13th day of May, in the year of our Lord one thousand eight hundred and seventy-two.

E. H. DURELL, *Judge.*

23 (Indorsed:) United States circuit court. No. 6521. Sidney A. Stockdale, plaintiff in error, vs. Merchants' Mutual Insurance Company of New Orleans, def'd'ts in error. Citation.

Marshal's return.

Received May 14, '72, by the U. S. marshal, and, on the 15th day of May, 1872, served a copy of within citation of appeal personally on P. Fourchy, president of the Merchants' Mutual Insurance Company of New Orleans.

New Orleans, June the 24th, 1872.

S. W. REED,
D'y U. S. Marshal.

On this 24th day of June, 1872, personally appeared before me the subscriber, S. W. Reed, & makes oath that he delivered a true copy of the within citation as stated in his official return hereon.

S. W. REED,
D'y U. S. Marshal.

Sworn to & subscribed before me.

F. B. VINOT,
U. S. Comm'r.

(Indorsement on cover:) No. 275. Sidney A. Stockdale, collector of internal revenue, plaintiff in error, vs. The Merchants' Mutual Insurance Company. Louisiana C. C. U. S. Filed 27 November, 1872.

REC. 275—2

O

Supreme Court of the United States.

No. 275.

SIDNEY A. STOCKDALE, Collector of Internal Revenue,

Plaintiff in Error,

VERSUS

THE MERCHANTS' MUTUAL INSURANCE COMPANY OF NEW ORLEANS.

In Error to the Circuit Court of the United States for the District of Louisiana.

BRIEF FOR DEFENDANT IN ERROR.

CHARLES CASE,
Counsel.

J. D. ROUSE,
Attorney.

CLARK & HOFFLIN'S, BOOK PRINTERS, 9 BANK PLACE.

Supreme Court of United States.

No. 287. 275

SIDNEY A. STOCKDALE, COLLECTOR OF INTERNAL REVENUE,
Plaintiff in Error,

VERSUS

THE MERCHANTS' MUTUAL INSURANCE COMPANY OF NEW ORLEANS.

In Error to the Circuit Court of the United States for the District of Louisiana.

Brief for Defendant in Error.

This suit was brought by the defendant in error—plaintiff below—to recover money paid to the plaintiff in error, collector of internal revenue, as taxes upon a certain dividend declared by said Company the 3d day of June, 1870.

A jury was waived, and the facts agreed upon substantially as follows :

The plaintiff below is a corporation engaged in the business of fire and marine insurance. Upon the 3d day of June, 1870, the Company declared a dividend out of

the earnings which had accrued to it during the year ending May 31st, 1870, amounting to the sum of two hundred and fifteen thousand eight hundred and fifty dollars; and at the same time added to its surplus or contingent fund, the sum of six thousand and ten dollars and twenty-two cents, which dividend was paid to the stockholders of said corporation, on and after the 1st day of August, 1870, no deduction being made therefrom for account of any tax.

Upon such dividend and surplus profits, the assessor assessed a tax of five per centum, amounting to the sum of eleven thousand and ninety-three dollars and one cent.

The plaintiff in error, demanded payment of said tax, and notified said Insurance Company that if the same was not paid he would distrain and sell the property of said Insurance Company to make such tax; and thereupon said Insurance Company paid the said tax.

The Company appealed to the Commissioner to refund the same, which appeal was rejected, and this suit brought within the time limited.

Upon these facts the Circuit Court gave judgment in favor of the Insurance Company.

We assert the correctness of that judgment, and in support thereof maintain the following propositions of law:

I.

The tax of five per centum imposed upon the dividends of Insurance Companies by section 120 *of the act of June* 30, 1864, *as amended July* 13, 1866, *is a tax upon the income of the stockholders, and not a tax upon the Corporation.*

In this case the validity of the tax is sought to be maintained under the provisions of section 120, act of June 30, 1864, as amended July 13, 1866. 14 *U. S. Statutes*, 138.

We are not aware of any adjudication upon the construction of this section, but the question as to the proper construction of section 122, of the same act, which is very similar, has been often before the Courts, and several times before this Court. Attention is respectfully called to the discussion of this subject in our brief, in *Stockdale vs. Crescent City Railroad Co.*, No. 270, which is hereto annexed to avoid repetition of the argument herein. What is there said is greatly strengthened, by comparison of section 120 with section 122. The language of section 120 is "That there shall be levied and collected a tax of five per centum *on all dividends* in scrip or money thereafter declared due, * * * as part of the earnings, income, or gains of any bank, trust company, savings' institution, and of any fire, marine, life, inland insurance company," etc. etc. It also requires the banks, insurance companies, etc., to pay the tax, and authorizes them to withhold the same from payments of dividends, etc.

Section 122 enacts that any railroad company, etc., indebted for money, represented by bonds, etc., upon which interest is to be paid; or any such Company that may have declared any dividend, shall be subject to pay a tax of five per centum thereon. Whatever doubt may be raised as to the construction of section 122, there certainly can be no construction which will warrant the theory

that section 120 imposed the tax upon the corporations named.

II.

The tax upon incomes imposed by the act of June 30, 1864, *as amended, expired by limitation the thirty-first day of December*, 1869.

The argument in support of this proposition is to be found in our brief in No. 270, p. —, hereto annexed, to which we again repectfully ask reference.

In this case the dividend was declared out of the earnings of the Company during the year ending May 31, 1870. If the Court shall sustain our propositions as above, the judgment must be affirmed. In any event, that portion of the earnings accrued during the year 1870, whether it be regarded as income of the individual, or income of the corporation, is not subject to any tax.

The assessment being erroneous in part, it is fatal to the whole. There can be no apportionment, or correction, by the Court.

By the assessment of a larger tax than is due, the whole assessment becomes void.

Clark vs. *Strickland*, 2 Curtis, C. C. R. 439.

Stetson vs. *Kempton et al.*, 13 Mass., 283.

Libby vs. *Burnham et al.*, 15 Mass. Rep. 144; 3 Cush. 569.

Union National Bank vs. *City of Chicago*, 3 Bissell, 82.

The dividend in question was not payable until the month of *August*, 1870. Under act of June 30, 1864, no tax accrued upon such dividends until they became *due*

and payable, and the law was uniformly construed by the government, to impose the tax upon all dividends payable after its passage. The Commissioner of Internal Revenue [illegible] issued a circular dated July 1st, 1864, declaring that "all dividends payable on and after July 1, 1864, no matter when declared, are subject to the duty of five per centum." [*Dissenting Opinion of Justice Strong*, 17 I. R. R. 109; *Boutwell's Manual*, 1864, p. 254.] He also instructed assessors to "bear in mind that the *date* when the interest and dividends are payable *determines the rate of taxation*." Ibid. The language of the law is, "*whenever* payable." That the above is the proper construction is conclusively shown, by the provision requiring returns of such dividends, to-wit: "And a list or return shall be made and rendered to the assessor or assistant assessor on or before the tenth day of the month *following* that in which any dividends or sums of money *become due or payable*." 14 *U. S. Statutes*, 138.

The construction given by the 17th section of the act of July 14, 1870, seeks to extend the law only *until* the 1st of August, 1870. It does not include that date. Whatever effect may be given to the act it expired with the last day of July, 1870. Thereafter no taxes under the acts mentioned could be levied or assessed. 16 *U. S. Statutes*, 261. It follows then, that no law imposed any tax upon this dividend, unless it be the 15th section of the act of July 14, 1870, which imposed a tax of *two and one-half* per centum, upon such dividends, "*for and during the year* 1871." 16 *U. S. Statutes*, 260. It has

been held that this act did not impose any tax upon dividends declared or payable in 1870. *Philadelphia and Reading R. R. Co. vs. Kenney*, 18 Int. R. R. 92. But this need not be argued, because no such tax is under consideration. If any law authorizes such tax, it was not assessed, but a tax of *five* per centum was assessed and collected, and that alone we have to deal with, and we have shown that it was not authorized by law.

III.

There has been no legislation which could effect an extension of the time during which such tax could be imposed.

IV.

The constitutional rule requiring uniformity in excise taxes is violated by the act of July 14, 1870.

V.

1.—*Corporations had no authority to withhold tax from their dividends or interest, after the expiration of the act of June* 30, 1864.

2.—*Congress could not, after their payment of dividends or interest, without deduction of tax, retroactively subject the corporations to liability therefor.*

The argument in support of these propositions, is contained in our brief, in No. 270, hereto annexed,—commencing at p. et seq., whereto we now refer.

For these reasons the judgment of the Circuit Court should be affirmed.

Respectfully submitted.

J. D. ROUSE,
Attorney for Defendant in Error.

CHARLES CASE,
Counsel.

Supreme Court of United States.

No. 270.

SIDNEY A. STOCKDALE, Collector of Internal Revenue,
Plaintiff in Error,

VERSUS

THE CRESCENT CITY RAILROAD COMPANY.

In Error to the Circuit Court of the United States for the District of Louisiana.

Brief for Defendant in Error.

This suit was brought by the defendant in error—plaintiff below—to recover certain sums of money paid to the plaintiff in error, collector of internal revenue, as taxes upon certain dividends declared by the Railroad Company and paid to its stockholders.

A jury was waived, and the facts agreed upon by the parties substantially as follows :

The Railroad Company is a corporation engaged in the business of transporting passengers for hire. Upon the twelfth day of January, 1870, it declared a dividend of its earnings for the year 1869, amounting to the sum of thirty thousand dollars, and again on the thirteenth day of July,

1870, declared a dividend from its earnings from the first day of February, to the 31st day of July, 1870, amounting also to the sum of thirty thousand dollars. Upon each of these dividends the assessor assessed an alleged tax of five per centum, amounting to the sum of fifteen hundred dollars in each case, and he also assessed the further sum of seventy-five dollars in each instance upon the amount of said tax. The Railroad Company paid each of said dividends in full to its stockholders, without any deduction on account of said tax, and denied any liability to make any return thereof to the assessor or to pay any tax to the collector thereon. The collector under threat of distraint, collected said assessments; the Railroad Company appealed to the Commissioner to refund the same, which appeals were rejected, and the Company brought suit within the time limited.

Upon these facts the Circuit Court gave judgment in favor of the Railroad Company.

We assert the correctness of that judgment, and in support thereof maintain the following propositions of law:

I.

The tax of five per centum imposed upon the dividends of Railroad Companies by Section 122 *of the act of June* 30, 1864, *as amended, is a tax upon the income of the Stockholder, and not a tax upon the Corporation.*

In this case the validity of the tax levied and collected is sought to be maintained under the provisions of section 122, act of June 30, 1864, as amended July 13, 1866.

14 U. S. Statutes, 138.

The question as to the proper construction of this section has been often before the Courts and several times before this Court. The latest decision of this Court upon this question affirms our proposition. In the case of *The United States vs. The Baltimore and Ohio Railroad Company*, decided April 7, 1873, (not yet reported) this Court after quoting from its previous decisions in the cases of *Jackson vs. Northern Central Railroad Company*, 7 Wall. 262, and *Haight vs. Pittsburg*, 6 Wall. 17, in affirmance of this proposition, said:

"This is a clear, distinct unqualified adjudication by the unanimous judgment of this Court, that the tax imposed by the 122d section is a tax imposed on the creditor or stockholder therein named; that the tax is not upon the corporation and that the corporation is made use of as a convenient and effective instrument for collecting the same. It is a sequence in logical connection, that provision of secon 117 which specifies as the subjects of individual taxation all the earnings, profits, gains and incomes, from whatever source derived, and whether divided or not *except* the amount derived from the sources indicated in the 122d section. Of the incomes specified in section 117 the individual must make specific returns and be directly taxed thereon. Upon or from the incomes received from the sources mentioned in section 122, no tax is directly imposed upon the owner. That tax is to be returned by and collected from the corporation as his agent or instrument. * * The corporation parts not with a farthing of its own property. Whatever sum it pays to the government is the property of another. Whether the tax is five per cent. on the dividend or interest, or whether it be fifty per cent. the corporation is neither richer nor poorer. Whatever it thus pays to the government it by law withholds from the creditor. If no tax exists it pays seven per cent. or whatever be its rate of interest to its creditors in one un

broken sum. If there be a tax it pays exactly the same sum to its creditors less five per cent. thereof and this five per cent. it pays to the government. The receivers may be two or the receiver may be one, but the payer pays the same amount in either event. It is no pecuniary burden upon the corporation, and no taxation of the corporation. The burden falls on the creditor. He is the party taxed. * * If the tax were upon the Railroad there is no defence. It must be paid. But we hold that the tax imposed by the 122d section is in substance, and in law a tax upon the income of the creditor or stockholder, and not a tax upon the corporation."

This decision, it is true, was made under thes ection as it stood before its amendment, by the act of July 13th, 1866, but an analysis of that amendment will show that there is nothing in it which can affect this construction. A comparison of the original section in the act of June 30, 1864, 13 U. S. Statutes, 284, with the re-enactment of it July 13th, 1866, shows that no change whatever was made in the phraseology of that portion imposing the tax. That portion as amended reads as follows:

"That any railroad, canal, turnpike canal navigation, or slack-water company, indebted for any money for which bonds, or other evidences of indebtedness, have been issued, payable in one or more years after date, upon which interest is stipulated to be paid, or coupons representing the interest, or any such company that may have declared any dividend in scrip or money due or payable to its stockholders, *including non.residents, whether citizens or aliens*, as part of the earnings, profits, increase, or gains of such company, and all profits of such company carried to the account of any fund, or used for construction, shall be subject to and pay a tax of five per centum on the amount of all such interest, or coupons, dividends, or profits, whenever *and wherever* the same shall be payable, *and*

to whatsoever party or person the same may be payable, including non-residents, whether citizens or aliens; and said companies are hereby authorized to deduct and withhold from all payments, on account of any interest, or coupons, and dividends due and payable as aforesaid, the tax of five per centum, and the payment of the amount of said tax so deducted from the interest, or coupons, or dividends, and certified by the president or treasurer of said company, shall discharge said company from that amount of the dividend, or interest, or coupon on the bonds or other evidences of their indebtedness so held by any person or party whatever, except where said companies may have contracted otherwise." * * * *

The language is identical with the act of 1864, with the exception of the words in italics, which were inserted, and the word *tax*, wherever it occurs, was substituted for the word *duty*, in the original act. These italicised words are the same that were introduced by the amendment of March 2, 1866.

It is seen at once, that the effect of these amendments was to impose the tax upon "*non-residents, whether citizens or aliens.*" Similar provisions were, by the same act, incorporated into section 116, for the same purpose. The word "*wherever*" was introduced to cover payments beyond the limits of the United States. That this effect was the sole object and purpose of Congress, is plain, when we remember, that the Circuit Court in the *Northern Central Railroad Company vs. Jackson*, (s. c. Jackson vs. Railroad Company, 7 Wall. 262,) had just decided that the act of 1864 did not impose the tax upon *non-resident aliens.*

We are not ignorant of the ruling of a majority of this Court in *Barnes et al.* vs. *Philadelphia and Reading R. R.*

Co., decided March 3, 1873, where it said: "Different regulations for the assessment and collection of the income taxes of every kind were prescribed in the prior laws imposing internal revenue duties, * * * but they were not in all respects satisfactory, and many controversies had arisen. * * * "Congress accordingly, in order to remove these difficulties, imposed the tax upon the railroad companies." Again the Court said: "Such a dividend as that made by a railroad company is not required to be included in the return made by the shareholder of his gains, profits and income, but is expressly required by law to be retured by the president or treasurer of the railroad company as before explained, and the act of Congress in terms provides that the company shall be liable to and pay the tax, no matter when or where, or to whatsoever party or person the dividend may be payable. *Prior to that time the rule had been different*" etc.

With all due respect, we ask the Court to reconsider this question, and with the more confidence, because four of the members of this Court dissented from that opinion, and because, after a careful comparison of the original with the amended section 122, we are unable to see any foundation for the conclusion arrived at. We ask it to reconsider this ruling, because it denies all effect to the amendment. If this construction be correct, there was no necessity for introducing the words, "*including non-residents, whether citizens or aliens*," and Congress did a vain thing by its amendment. We understand it to be a

rule of construction to give effect to an act, rather than to pronounce it an unnecessary piece of legislation.

We ask a reconsideration, because the conclusion is based upon the supposition that prior to the act of July 13, 1866, the railroad companies were not required to make return or pay the tax,—the language of the Court is, "prior to that time *the rule had been different*"—whereas the same requirements as to returns and payment of the tax by the railroad companies, (except that the payment was to be to the Commissioner,) and the same penalties for default in returning or paying the tax, are to be found in both acts. Stress seems to have been laid on the provision in section 116 of June 30, 1864, requiring the amount of dividends received from corporations to be included in the stockholders' income return, and its omission from the act of March 2, 1867. But as he was also authorized to deduct the tax thereon paid by the corporation, and withheld from him, from the amount otherwise due from him, its repeal simply dispensed with a useless formality.

We respectfully submit, that in view of the language imposing the tax being identical in both acts, the unanimous opinion of this Court in *Haight* vs. *Pittsburg* and *Jackson* vs. *Railroad Co.*, construing section 122 to impose a tax upon the recipients of dividends and interest, and not upon the corporation, requires the same construction to be placed upon the amended section; and no doubt this Court, upon more mature reflection, was of this opinion, when the decision in *The United States* vs. *Baltimore and Ohio R. R. Co.*, was rendered.

II.

The tax upon incomes imposed by the act of June 30, 1864, *as amended, expired by limitation the thirty-first day of December*, 1869.

The limitation is found in section 119 as amended March 2, 1867, 14 U. S. Stat. 480, which provides "that the taxes on incomes herein imposed shall be levied on the first day of March, and be due and payable on or before the thirtieth day of April in each year, until and including the year 1870, and no longer." It is elsewhere provided that the taxes so to be levied were to be levied upon the incomes "for the year ending the thirty-first day of December next preceding the time for levying, collecting and paying said tax." Therefore the last levying of such tax being for the year 1870, it was limited to income of 1869. Seetion 119 imposes no tax. The reference to taxes on income "herein imposed" must be applied to all the taxes on income, and the tax upon dividends and interest, being a tax upon income, could not be legally imposed upon such as were payable or earned after December 31, 1869. This fact was early recognized by the late Commissioner of Internal Revenue, as is evident from the language of his report, (1870) page 13. He says that as early as January 4, 1870, he "asked for legislation upon the subject." His recommendations are not before us, but the frequent repetition of his request, shows that he fully recognized, that without legislation, such tax could not be legally continued.

In this case both dividends were declared and payable

subsequent to the 1st of January, 1870, and were income for that year. If the Court shall sustain our first and second propositions, the judgment must be affirmed. But if the Court shall hold that the tax was imposed upon the Railroad Company and not upon the shareholder, still the tax is an income tax—a tax upon the income of the Railroad Company—and the second dividend, declared out of the income and earnings of said Company, which accrued to it between the 1st of February and the 31st of July, 1870, was not subject to any tax. Neither was there any sanction in law for the assessment and collection of a tax upon the tax assessed, as was done in this case.

III.

There has been no legislation which could effect an extension of the time during which such tax could be imposed.

The 17th section of the act of July 14, 1870, 16 U. S. Stat. 261, is the only enactment it is necessary to consider under this head. It provides "that sections one hundred and twenty, one hundred and twenty-one, one hundred and twenty-two, and one hundred and twenty-three, of the act of June 30, 1864," as amended, "shall be *construed* to impose the taxes therein mentioned, to the first day of August, eighteen hundred and seventy."

This act is simply declaratory of the opinion of Congress, and not a re-enactment of the law itself. This very attempt to continue the law in force by *construction* is an admission that it had expired. The *construction* of statutes belongs, not to Congress but to the judiciary. If the law

were still in force, the judiciary would be bound to place upon it a construction given by Congress, and Congressional construction would have the effect of legislation, *after the passage of the act.* But Congress cannot construe statutes *retroactively.* In the United States vs. Dickson, 15 Peters, 162, Story, J., said: "It is not to be forgotten that ours is a government of laws and not of men, and that the judicial department has imposed upon it, by the constitution, the solemn duty to interpret the laws in the last resort; and however disagreeable that duty may be, in cases where its own judgment shall differ from that of other high functionaries, it is not at liberty to surrender or to waive it."

In the case of Postmaster General vs. Early, 12 Wheaton, 136, Chief Justice Marshall laid down the rule that "A mistaken opinion of the Legislature concerning the law, does not make law. But if this mistake is manifested in words competent to make the law *in future*, we know of no principle which can deny them this effect. The Legislature may pass a declaratory act, which, though *inoperative on the past*, may act in future."

In Barrett vs. U. S., 2 Court of Claims Reports, 448, the statute under consideration was the third section of the act of March 3, 1867, to-wit: "That an act entitled an act to increase the pay of soldiers in the United States army, and for other purposes," approved June 20, 1864, shall not be so *construed* as to increase the emoluments of the commissioned officers of the army at the *date of its passage;*" and the court held that, "This clause of form

directs as to the construction of the act of 1864, *and to construe acts is the province of the judiciary.*" * *

"But it is also the duty of the judiciary to give to the acts of the Legislature their intended practical operation, as far as that is possible; and we think it clear that the Legislature intended to prevent the use of the statute of 1864, as a measure for computing the pay of officers' servants, and that the words of the clause cited are competent to effect that purpose, *from the date of its enactment.*"

In the schooner Aurora Borealis vs. Dobbie, 17 Ohio Rep., 125, the Court say: "It is the right of the Legislature to enact laws, and the province of the Court to construe them. The Legislature has no right to enact a law declaring what *construction* or decision the court shall make upon acts under which rights or liabilities have been acquired or accrued." * * * *

"The explanatory act operates prospectively, and has *from the time of its passage*, the force and effect of law. But so far as it assumes to encroach upon the province of the Court, and assumes to give *construction* to existing acts, to govern the decisions of the courts, as to cases pending, it is judicial; and as the constitution confers judicial power upon the courts, and withholds it from the Legislature, to that extent such acts will be inoperative. As a law such an act will be enforced; as a construction of previous acts, under which cases are already pending in the courts, it will be void." "These are fundamental principles about which there can be no question."

This and some of the following cases arose under State legislation, but the reasoning is equally applicable to acts of Congress.

"The right to make laws is vested in the General Assembly. The right to *decide* what the law *is* and what it *was* is vested in the Supreme Court." * * * "It is settled that the Legislature cannot pass any declaratory law or act declaring what the law was before its passage, so as to give it any binding weight with the courts." Houston vs. Bogle, 10 Iredell, 505.

"The power of the Legislature is not judical. It is limited to the making of laws; not to the exposition or execution of them." McLeod et al. vs. Burroughs, 9 Geo. 213.

"The judiciary alone is to determine what the law is." * * * "The National Congress within the grant of powers to the general government, and the State legislatures, where not restrained by the federal or their own constitutions, may pass whatever laws they think proper; but it is still, as I have already remarked, the judiciary only which can settle what the law *is* or *has been*." Lafayette county ex rel. Knowlton, 2 Chandler Rep. (Wis.) 220.

The following cases also fully support this doctrine, viz: United States vs. Klein, 13 Wallace, 128, 147; Ogden vs. Blackledge, 2 Cranch, 272; Reiser vs. William Tell etc. Association, 39 Penn State Rep. 137; Atkinson vs. Dunlap, 50 Maine, 111; McDaniel vs. Cowell, 19 Ills. 226; Gordon vs. Ingraham, 1 Grant's Cases, 152; Stephenson vs.

Doe, 8 Blackf. 515; Kennett's Petition, 4 Foster, 139; Woart vs. Winnick, 3 N. H. 481; Clark vs. Clark, 10 N. H. 386; 18 Howard, 421; 16 Ohio Rep. 610; 5 Humph. 165.

Congress then, seeking to construe the law, exceeded its powers, and its action in this is void.

IV.

The constitutional rule requiring uniformity in excise taxes is violated by the act of July 14, 1870.

The first paragraph of section eight, article one of the Constitution of the United States provides, among other things, that, "All duties, imposts and excises shall be uniform throughout the United States."

We presume it will be conceded that the tax upon incomes is an excise tax, in the meaning of this article of the constitution. This court so decided in Pacific Insurance Company vs Soule, 7 Wall. 433. Section six of the act of July 14, 1870, imposes a tax upon incomes of *two and one-half* per centum for the years 1870 and 1871. Section seventeen of said act seeks to impose a tax of *five* per cent. upon income derived from the corporations enumerated in Secs. 120, 122 and 123 of the act of June 30, 1864, as amended, during the first seven months of the year 1870, the time so far as it extends, being identical with that during which a tax of two and one-half per centum is imposed upon all other incomes subject to tax. No argument is necessary to show that in this, the constitutional requirement of uniformity, is violated. One of the objects of the constitution being to "establish justice,"

the wisdom of the foregoing provision is apparent, when it becomes necessary to invoke it to protect A, whose fortune is invested in bank or railroad stocks, from being taxed upon his revenue therefrom double the amount that B is taxed upon his income, because he gathers it in the vortex of commerce. "Taxation by a *uniform rule* requires uniformity not only in the *rate* of taxation, but also uniformity in the mode of assessment." Gilman vs. City of Sheboygan, 2 Black. S. C. Rep. 517; Exchange Bank of Columbus vs. Hines, 3 Ohio St. Rep. 1; Knowlton vs. Supervisors, 9 Wis. 410; Sanderson vs. Cross, 10 Wis. 282; City of Zanesville vs. Richards, 5 O. S. 589; Paine vs. Wright, 6 McLean, 395.

Again, section seventeen of said act seeks to continue in force a tax of five per centum upon such incomes only as were derived from the corporations named in the sections which are sought to be revived. A simple statement of this proposition is sufficient; that the imposition of a tax upon incomes must be universal; that to impose such tax upon incomes derived from particular sources, and leave income from other sources untaxed, would be a violation of the rule of uniformity, required by the constitution.

The force of this proposition is not weakened, because exemption of a certain sum is permissible, but is rather strengthened by the fact that such exemption must also be uniform, and only reduce the sum upon which the tax shall be computed, without making any discrimination against individuals.

V.

1.—*Corporations had no authority to withhold tax from their dividends or interest, after the expiration of the act of June* 30, 1864.

2.—*Congress could not, after their payment of dividends or interest, without deduction for tax, retroactively subject the corporations to liability therefor.*

The law thus sought to be extended by legislative construction created the corporations whose dividends were taxed under it, the agents of the government for the collection of the tax. That agency expired with the law. It was only by virtue of the express authority conferred in the act that they could retain the tax upon payment of dividends and interest. When the law ceased to authorize the withholding of a per centage as a tax, the holders of shares and coupons had a right to demand and receive payment of their dividends and interest in full, and if any such per centage had been withheld would have had an immediate right of action therefor. To give effect to the act of July 14, 1870, and construe the expired statute to extend over the intervening time, would impose retroactively the liability of an agent upon these corporations, without the possibility of their fulfilling the duties thereof in withholding the tax from their dividend which had already been paid in full.

To compel them, under such circumstances, to pay such tax for their share or bondholders, would amount practically to confiscation. It will not do to say they might reimburse themselves by withholding the amount from

future dividends or interest. The negotiable character of railroads bond, and ready transfer of stocks, with the speculative mania at our great monetary centre, render it extremely improbable that more than a small proportion of shares or bonds would be in the same hands, when the next dividend or interest became payable.

Respectfully submitted.

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